

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED  
STATES DEPARTMENT OF JUSTICE CERCLA SECTION 122(h)(1) CASHOUT  
AGREEMENT FOR ABILITY TO PAY PERIPHERAL PARTIES**

In RE: Shawn Callister  
Plain City Drum Site, Weber County, Utah

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**CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT  
FOR ABILITY TO PAY PERIPHERAL PARTIES**

FILED  
EPA REGION VIII  
HEARING CLERK

|                      |   |  |
|----------------------|---|--|
| IN THE MATTER OF:    | ) | AGREEMENT                                    |
|                      | ) |  |
| Plain City Drum Site | ) | U.S. EPA Region 8                            |
| Weber County, Utah   | ) | CERCLA Docket No. <u>CERCLA-08-2005-0008</u> |
|                      | ) |  |
| Shawn Callister      | ) | PROCEEDING UNDER SECTION                     |
| SETTLING PARTY       | ) | 122(h)(1) OF CERCLA                          |
|                      | ) | 42 U.S.C. § 9622(h)(1)                       |

**I. JURISDICTION**

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the EPA Administrator by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and delegated by him to the Directors of the Legal and Technical Enforcement Programs. .

2. This Agreement is made and entered into by EPA and Shawn Callister ("Settling Party"). Settling Party consents to and will not contest the authority of the United States to enter into this Agreement or to implement or enforce its terms.

**II. BACKGROUND**

3. This Agreement concerns the Plain City Drum Site ("Site") located in Weber County, Utah. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, including emergency removal actions to overpack and properly dispose of 28, 55-gallon drums containing flammable liquids. At the time of removal the drums were in poor condition, bulging, with rusting holes in some of the drums. On Site air monitoring showed the drums were releasing hazardous constituents in the air. The drums were located adjacent to an occupied

house with horse corrals, and approximately 3.5 miles from the Harold's Crane Waterfowl Management Area.

5. In performing response action at the Site, EPA has incurred response costs.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA has reviewed the Financial Information submitted by Settling Party to determine whether Settling Party is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, EPA has determined that Settling Party has limited financial ability to pay for response costs incurred and to be incurred at the Site.

8. EPA and Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

### **III. PARTIES BOUND**

9. This Agreement shall be binding upon EPA and upon Settling Party and his heirs, successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

### **IV. STATEMENT OF PURPOSE**

10. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Party to make a cash payment to address its alleged civil liability for the Site as provided in the Covenant Not to Sue by EPA in Section VIII, subject to the Reservations of Rights by EPA in Section IX.

### **V. DEFINITIONS**

11. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. **"Agreement"** shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. **"CERCLA"** shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

c. **"Day"** shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. **"EPA"** shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

e. **"Financial Information"** shall mean those financial documents including federal tax returns, property settlement sheets, balance sheets and ownership and encumbrance reports.

f. **"Interest"** shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. **"Paragraph"** shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.

h. **"Parties"** shall mean EPA and Settling Party.

i. **"RCRA"** shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, et seq. (also known as the Resource Conservation and Recovery Act).

j. **"Section"** shall mean a portion of this Agreement identified by a Roman numeral.

k. **"Settling Party"** shall mean Shawn Callister.

l. **"Site"** shall mean the Plain City Drum site, an Emergency Removal Superfund site, encompassing approximately 10 (ten) acres, located at 2323 North 6700 West, Plain City, Utah in Weber County, Utah.

m. **"United States"** shall mean the United States of America, including its departments, agencies, and instrumentalities.

## **VI. PAYMENT OF RESPONSE COSTS**

12. Within 30 days after the effective date of this Agreement as defined by Paragraph 32, payment shall be made as indicated herein, by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The total settlement amount of \$10,000.00 (ten thousand and no dollars) shall be made in two payments of \$5,000.00 (five thousand and no dollars). The first payment shall be made twenty days from the effective date of this Agreement. The second payment shall be made one hundred and ten days from the effective date of this Agreement. The payments, or a letter accompanying the payments, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # 08-FB, and the EPA docket number for this action, and shall be sent to:

**Regular Mail :**

Mellon Bank  
Attn: Superfund Accounting  
Lockbox 360859  
Pittsburgh, PA 15251-6859

**Express Mail:**

Environmental Protection Agency 360859  
Mellon Client Service Center Room 154-0670  
500 Ross Street  
Pittsburgh, PA 15262-0001

At the time of each payment, the Settling Party shall also send notice that such payment has been made to EPA in accordance with Section XIV (Notices and Submissions).

13. The total amount to be paid by Settling Party pursuant to Paragraph 12 shall be deposited by EPA in the EPA Hazardous Substance Superfund.

## **VII. FAILURE TO COMPLY WITH AGREEMENT**

14. If Settling Party fails to make any payment required by Paragraph 12 by the required due date, Settling Party agrees to pay the entire amount of response costs incurred at the Site, \$34,867.31 immediately upon request from EPA. Interest shall continue to accrue on the unpaid balance of the entire amount of response costs through the date of payment.

15. In addition to the payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with any term or condition of this Agreement, he shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce

this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

#### **VIII. COVENANT NOT TO SUE BY EPA**

16. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take judicial or administrative action against Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to the Site. With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Payment of Response Costs). This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Party. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Party shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other causes of action arising from Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Party and does not extend to any other person.

#### **IX. RESERVATIONS OF RIGHTS BY EPA**

17. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 18. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Agreement;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability, based upon Settling Party's ownership or operation of the Site, or upon Settling Party's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after execution of this Agreement by Settling Party; and
- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

18. Notwithstanding any other provision of this Agreement, EPA reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Agreement, if the Financial Information provided by Settling Party, or the financial certification made by Settling Party in Paragraph 28(b), is false or, in an material respect, inaccurate.

19. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

#### **X. COVENANT NOT TO SUE BY SETTTLING PARTY**

20. Settling Party agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 24 (Waiver of Claims) and Paragraph 27 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 19(c) - (e), but only to the extent that Settling Parties' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

21. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

22. Settling Party agrees not to assert any claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person who is a party to this Agreement. This waiver shall not apply with respect to any defense, claim, or cause of



action that Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

## **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

23. Except as provided in Paragraph 22, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

24. The Parties agree that Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are all response actions taken or to be taken, excluding those to enforce this Order, and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person who is a party to this Agreement. The "matters addressed" in this Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Agreement (except for claims for failure to comply with this Agreement), in the event that EPA asserts rights against Settling Party coming within the scope of such reservations.

25. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been addressed in this Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by EPA set forth in Section VIII.

## **XII. RETENTION OF RECORDS**

26. Until 3 (three) years after the effective date of this Agreement, Settling Party shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate or personal retention policy to the contrary.

27. After the conclusion of the document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records, and, upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege

recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (e.g., company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record will be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

### **XIII. CERTIFICATION**

28. Settling Party hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the state or the filing of a suit against it regarding the Site and that it has fully complied with any and all EPA requests for documents or information regarding the Site and Settling Party's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927;

b. submitted to EPA Financial Information (including Federal Tax Returns, Income and Earnings Statement, List of properties owned with encumbrance information for each) that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Party executes this Agreement; and

c. fully disclosed the existence of any insurance policies that may cover claims relating to cleanup of the Site.

### **XIV. NOTICES AND SUBMISSIONS**

29. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Party.

As to EPA:

Katherine Letson Bradford  
Senior Enforcement Counsel  
EPA Region 8, ENF-L  
999 18<sup>th</sup> Street, Suite 300  
Denver, Colorado 80202

Financial Management Officer  
EPA Region 8, TMS-F  
999 18th Street, Suite 300  
Denver, CO 80202

Cost Recovery Program Manager  
EPA Region 8, ENF-RC  
999 18th Street, Suite 300  
Denver, CO 80202

As to Settling Party:

Mr. Shawn Callister  
2182 North 6700 West  
Warren, Utah 84404

**XV. INTEGRATION/APPENDICES**

30. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement:

None

**VI. PUBLIC COMMENT**

31. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

## **XVII. EFFECTIVE DATE**

32. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 31 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Agreement.

IT IS SO AGREED:

[Settling Party]

By: Shawn Callister  
Mr. Shawn Callister

May 24, 2005  
[Date]

U.S. Environmental Protection Agency

By: Michael T. Risner

Michael T. Risner

Director, Legal Enforcement Program

Office of Enforcement, Compliance and Environmental Justice

EPA Region 8

999 18<sup>th</sup> Street, Suite 300

Denver, Colorado 80202

6/14/05  
[Date]

By: Sharon L. Kercher

Sharon L. Kercher

Director, Technical Enforcement Program

Office of Enforcement, Compliance and Environmental Justice

EPA Region 8

999 18<sup>th</sup> Street, Suite 300

Denver, Colorado 80202

June 14, 2005  
[Date]